U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-E-S-R- LLC

DATE: NOV. 9, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of health care professionals, seeks to employ the Beneficiary as a nurse supervisor. The Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition and a subsequent motion to reopen, concluding that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary and its other sponsored workers.

The matter is now before us on appeal. The Petitioner provides a copy of its combined financial statements for 2014 and 2015. The Petitioner states that these financial statements, together with the evidence previously submitted, including its 2013 and 2014 tax returns, bank statements, and staffing contracts showing wage agreements with nursing homes, demonstrate that it has the ability to pay the proffered wages at issue.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

The instant petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such

occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a Schedule A petition is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The petition is accompanied by a duplicate uncertified ETA Form 9089. The petition was filed on June 7, 2015, the priority date. The proffered wage as stated on the ETA Form 9089 is $93,954 per year.

The Director denied the petition, concluding that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary and its other sponsored workers. The Petitioner filed a motion to reopen, and the Director affirmed his prior decision. The evidence in the record before the Director included: the Petitioner's 2013 and 2014 tax returns; the Petitioner's unaudited financial statements for January to September 2015; an earnings statement for the Beneficiary; staffing

contracts between the Petitioner and several nursing homes; and copies of the Petitioner's bank account statements for several months in 2015. The matter is now before us on appeal. On appeal, the Petitioner submits an accountants' compilation report with the Petitioner's combined balance sheets for 2014 and 2015. We have reviewed all evidence in the record.

On appeal, the Petitioner states: (1) that it has the ability to pay the Beneficiary's proffered wage as shown by the net income figure stated on its tax return for 2014; (2) that the Beneficiary's wage of $32 per hour would exceed the proffered wage; (3) that the Petitioner's supplemental staffing agreements indicate a reasonable expectation of increased business; and (4) that its monthly bank account statements show amounts that exceed the proffered wage.

III. ANALYSIS

At issue on appeal is whether the Petitioner has the continuing ability to pay the proffered wage to the Beneficiary and its other sponsored workers from the June 7, 2015, priority date onward. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In addition to establishing its ability to pay the beneficiary's proffered wage, a petitioner must also demonstrate it has the ability to pay the combined proffered wages of its other sponsored workers from the instant petition's priority date until the other beneficiaries have obtained lawful permanent residence, or until the date their petitions are denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In response to the Director's notice of intent to deny dated October 30, 2015, the Petitioner submitted a list of 29 Form I-140 petitions that it had filed, including the instant Form I-140. A search of USCIS records indicates that the Petitioner has sponsored additional Form I-140 beneficiaries, including several with 2016 priority dates.[1]

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

In the instant case, the record contains an earnings statement for the Beneficiary evidencing that she had earned $2368 in gross pay from the Petitioner year-to-date as of October 10, 2015. Therefore, the Petitioner must establish that it can pay the difference of $91,586 between wages paid to the Beneficiary and the proffered wage. The record does not contain earnings statements, IRS Forms W-2, or any other evidence of wages paid by the Petitioner to the other Form I-140 beneficiaries.

The record indicates that the Petitioner is a limited liability company (LLC) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income.[3] The Petitioner's federal income tax returns reflect annual net income[4] amounts of $200,067 and $420,445 in 2013 and 2014, respectively.

---

[1] In his December 10, 2015, decision, the Director noted that the Petitioner submitted a list indicating that there were 25 beneficiaries with pending Form I-140 petitions and that the combined proffered wages for these 25 beneficiaries was $1,757,665. However, the record does not contain any receipt notices, labor certifications, or other documentation supporting the claimed petitions and their corresponding proffered wages.

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd.*, 736 F.2d at 1309; *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[3] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

[4] For an LLC taxed as a partnership, where the petitioner's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, where the petitioner has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 5 of Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (last visited Nov. 1, 2016) (indicating that Schedule K is a summary schedule of all owners' shares of the entity's income, deductions, credits, etc.). In the instant case, the Petitioner's net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2013 and 2014 tax returns.

Because these tax returns precede the priority date, these figures do not establish that the Petitioner had sufficient net income to pay the proffered wage to the Beneficiary and the Petitioner's other sponsored workers in 2015. The record does not contain the Petitioner's tax return, audited financial statements, or annual report for 2015 as required by 8 C.F.R. § 204.5(g)(2).

The Petitioner submitted an accountants' compilation report containing balance sheets for 2014 and 2015, but these are not audited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.[5] Therefore, the Petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's 2013 tax return stated net current assets of $147,937, and its 2014 tax return stated net current assets of $102,937. Because these tax returns precede the priority date, these figures do not establish that the Petitioner had sufficient net current assets to pay the proffered wage to the Beneficiary and the Petitioner's other sponsored workers in 2015. The record does not contain the Petitioner's tax return, audited financial statements, or annual report for 2015 as required by 8 C.F.R. § 204.5(g)(2).

Therefore, the Petitioner has not established that it had sufficient net income or net current assets to pay the proffered wage to the Beneficiary and its other sponsored workers from the instant priority date onward.

---

[5] Similarly, the Petitioner's unaudited financial statements for January to September 2015 are also not reliable evidence of the Petitioner's ability to pay the proffered wage.

[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. In the instant case, the Petitioner was established in 2009. The record does not contain sufficient evidence of the Petitioner's financial history since its incorporation. The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage in 2015, the year of the priority date. We cannot rely upon the balance sheets for 2014 and 2015 because they are unaudited financial statements and constitute the representations of management in a consolidated form. The record does not contain any evidence of wages paid to the Petitioner's other sponsored workers or evidence of its reputation in its industry. We cannot adequately determine the Petitioner's ability to pay the proffered wages to the Beneficiary and its other sponsored workers based on the information contained in the record. Therefore, the Petitioner has not established its ability to pay the proffered wages based on the totality of the circumstances.

On appeal, the Petitioner states that its supplemental staffing agreements with nursing homes indicate a reasonable expectation of increased business and that its monthly bank account statements state amounts that exceed the proffered wage.[7] However, the contracts contained in the record do not obligate the nursing homes to hire the Petitioner's workers.[8] The Petitioner has not established the contracts in the record have increased or will increase its business. In addition, we do not consider the Petitioner's bank account statements as sufficient evidence to establish its ability to pay these proffered wages. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the Petitioner. Second, bank statements show the amount in

---

[7] The Petitioner cites the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), in support of this assertion. However, *Full Gospel* is not binding here. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Additionally, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. at 144-145, states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

[8] For example, the record indicates that the Beneficiary will work at [redacted] New York. The contract between the Petitioner and [redacted] dated March 18, 2013, indicates that [redacted] "may require the services of [the Petitioner's] staff," but there is no obligation on the part of [redacted] to hire any of the Petitioner's staff. The contract further states that nothing "shall prohibit [redacted] from obtaining Staff from other providers."

an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, it is not clear whether the funds reported on the Petitioner's bank statements exceed the Petitioner's total wage obligations for its sponsored workers. Therefore, the Petitioner has not established its ability to pay the proffered wages at issue.

IV. CONCLUSION

The Petitioner has not established that it has the ability to pay the combined proffered wages of the Beneficiary and its other sponsored workers. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-E-S-R- LLC*, ID# 11123 (AAO Nov. 9, 2016)